PENGIRAN OTHMAN SHAH BIN PENGIRAN MOHD. YUSSOF & ANOR.

v.

KARAMBUNAI RESORTS SDN. BHD. & 3 ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' N. H. CHAN JCA
DATO' SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO. S-01-29-94]
18 NOVEMBER 1995

LAND LAW: *Title deed - Leases - Restriction on title - Restriction incorporated by attaching the whole of Land Regulations to title - Regulations containing clause prohibiting transfer to non-native - Effect - Whether restriction amounted to just another condition - Deletion of clause by Director of Land and Survey with consent of successors in title - Whether proper - Land Regulations of the British North Borneo, 1894, clause 20 - Sabah Land Ordinance (Cap 68).*

PRACTICE & PROCEDURE: *Striking out - Order 18 r. 19 Rules of The High Court 1980 - Principles - Affidavit evidence adverting to dispute of facts - Whether could be ignored when inconsistent with unchallenged contemporary documents.*

The appellants had inherited from their mother an undivided half share of a parcel of land in Sabah which, together with the other half share owned by their grandmother, measured some 3935 acres in area (the Karambunai land). Attached to the title of the Karambunai land is a copy of the Land Regulations of British North Borneo, 1894, of which clause 20 forbids dealings on the land with non-natives. Between 1982 and 1992 the appellants had entered into several agreements with the 1st, 2nd and 3rd respondents, affecting the Karambunai land, and the result was that, at the end of it all, they ended up being beneficially entitled to only about 500 acres of the land, with the bulk of the remainder having either been sold or sub-leased to the respondents. The facts also showed that in an attempt to circumvent the restriction in clause 20, the appellant had applied to the Chief Minister of Sabah to delete clause 20 of Part III of the Annexure to the Deed of Lease in question. The Deed was eventually amended by the 4th respondent, the Pengarah Tanah dan Ukur, Sabah, whereby the said clause 20 was deleted.

In 1993 the 1st respondent applied for a declaration that based on the transactions it had entered into with the appellants, and the advances and loans made by them to the appellants, the Karambunai land had become its property. This suit is pending. The appellants, meanwhile, filed the present suit in which they sought to rescind the various agreements, on the ground that they had been unduly influenced by the 3rd respondent when executing them. They also sought to reinstate clause 20 in Part III to the Annexure to the Deed of Lease of the Karambunai land, alleging that the 4th respondent had acted *ultra vires* when deleting that clause. The appellants' suit, however, was struck out under O. 18 r. 19 Rules of the High Court 1980. Hence this appeal to the Court of Appeal.

Before the Court of Appeal the main issues that arose were:

1. Whether undue influence had in fact been exerted on the appellants to enter into the agreements as alleged, and hence, whether the appellants' claim had been properly struck out.

2. Whether in deleting clause 20 from the Annexure to the Deed of Lease the 4th respondent had acted *ultra vires*.

Held:

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

[1] The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the Court is a drastic power which should only be exercised in plain and obvious cases. The Court, however, is not prevented from granting the application even when a question of law becomes an issue if, as evidenced by this case, the Court is satisfied that that issue of law is unsustainable or unarguable. Likewise, where the affidavit evidence discloses a dispute of facts, the Court is entitled to reject those facts if they are found to be inconsistent with undisputed contemporary documents.

2. The facts showed that from the very beginning the parties were on equal footing, and there is no evidence that one party dominated the will of the other. There is no evidence that the appellants were denied independent legal advice when entering into the various agreements. In fact, the evidence was clear that they had executed the documents freely and without protest, and had received consideration for each of the agreements they had executed. This is clearly not a case where the appellants were rushed into executing the documents within a limited span of time.

3. The restriction placed by clause 20 is not incorporated as a numbered condition in the title itself but that the whole of the 1894 Regulations which contained the impugned clause 20 is attached to the title. This is most unusual and if it is intended that it shall have statutory force then it ceased to have such effect when the 1894 Regulations was repealed in 1904. In any case, there is nothing on the face of the title to indicate that it is a native title as defined in the Sabah Land Ordinance. It is merely a lease of the Karambunai land by the lessor to the lessee for 999 years, subject to the stated conditions and clause 20.

4. Clause 20 is just another condition to the title. The deletion of this clause started with the appellants appealing to the Chief Minister seeking approval to direct the 4th respondent to amend the title by deleting the clause. The appellants also sought the assistance of the Public Trustee, who administered the grandmother's estate, to agree to the deletion, which the latter obliged. Clause 20, thus, was deleted with the consent of the appellants, who are now successors in title, and such consent is sufficient to empower the 4th respondent to make the deletion.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Suratikatan hakmilik - Sekatan ke atas hakmilik - Sekatan digabungkan dengan menyertakan keseluruhan Peraturan-peraturan Tanah pada hakmilik - Peraturan-peraturan mengandungi fasal yang melarang pindahmilik kepada bukan penduduk asal - Kesan - Samada sekatan membawa maksud suatu syarat yang lain sahaja - Pemotongan fasal oleh Pengarah Tanah & Ukur dengan persetujuan pengganti hakmilik - Samada wajar - Peraturan Tanah British North Borneo, 1894, fasal 20 - Ordinan Tanah Sabah (Bab 68).*

AMALAN & PROSEDUR: *Pembatalan - Aturan 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 - Prinsip- prinsip - Keterangan afidavit merujuk kepada pertikaian fakta-fakta - Samada boleh tidak dihiraukan apabila tak konsisten dengan dokumen semasa yang tidak tercabar.*

Perayu-perayu tersebut telah mewarisi daripada ibu mereka setengah bahagian dari satu bidang tanah yang tidak berbahagi di Sabah, yang mana, bersama-sama dengan setengah bahagian lagi yang dimiliki oleh nenek mereka, mempunyai ukuran keluasan lebih kurang 3,935 ekar (tanah Karambunai tersebut). Terlampir pada hakmilik tanah Karambunai tersebut adalah sesalinan dari Peraturan Tanah British North Borneo, 1894, yang mana fasal 20 di dalamnya melarang sebarang urusan dengan pihak bukan penduduk asal. Antara tahun 1982 dan 1992 perayu telah memasuki beberapa perjanjian dengan responden-responden pertama, kedua dan ketiga, yang melibatkan tanah Karambunai tersebut, dan akibatnya adalah, pada akhirnya, mereka hanya berhak secara benefisialnya kepada lebihkurang 500 ekar dari tanah tersebut dan sebahagian besar yang selebihnya dari tanah itu telah samada dijual atau dipajak-kecilkan kepada responden. Fakta-fakta tersebut juga menunjukkan bahawa dalam suatu percubaan untuk memintasi sekatan dalam fasal 20, perayu telah memohon kepada Ketua Menteri Sabah untuk memotong fasal 20, Bahagian III Lampiran kepada Suratikatan Pajakan yang dipersoalkan. Suratikatan tersebut telah akhirnya dipinda oleh responden keempat, Pengarah Tanah dan Ukur, Sabah, di mana fasal 20 tersebut telah dipotong.

Dalam tahun 1993, responden pertama telah memohon untuk mendapatkan satu pengisytiharan bahawa berdasarkan transaksi yang telah dimasuki dengan perayu, dan pendahuluan-pendahuluan serta pinjaman yang dibuat oleh mereka kepada perayu, tanah Karambunai tersebut telah menjadi hartanya. Guaman ini sedang menantikan penyelesaian. Perayu sementara itu, telah memfailkan guaman ini, dalam mana mereka berusaha untuk membatalkan beberapa dari perjanjian tersebut, atas alasan bahawa mereka telah dipengaruhi dengan cara yang tidak wajar oleh responden ketiga ketika menyempurnakannya. Mereka juga berusaha untuk mengembalikan semula fasal 20 dalam Bahagian III kepada Lampiran pada Suratikatan Pajakan tanah Karambunai tersebut, dengan mendakwa bahawa responden keempat telah bertindak di luar kuasa undang-undang ketika memotong fasal itu. Guaman perayu walaubagaimanapun, telah dibatalkan di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980. Dengan itu rayuan ini.

Di hadapan Mahkamah Rayuan isu-isu yang telah berbangkit adalah:

1. Samada pengaruh yang tidak wajar telah pada hakikatnya diusahakan ke atas perayu-perayu supaya memasuki perjanjian-perjanjian sepertimana yang dikatakan, dan dengan itu, samada tuntutan perayu-perayu telah dibatalkan secara wajarnya.

2. Samada dalam memotong fasal 20 daripada Lampiran kepada Suratikatan Pajakan responden keempat telah bertindak di luar kuasa undang-undang.

Diputuskan:

Oleh Siti Norma Yaakob HMR (menyampaikan penghakiman Mahkamah):

[1] Kuasa budibicara untuk menolak sesuatu tindakan secara terusnya di bawah A. 18 k. 19 dan di bawah bidangkuasa Mahkamah yang sedia ada adalah suatu kuasa yang sangat berkesan yang mana hanya harus dilaksanakan dalam kes-kes yang nyata dan ketara. Mahkamah, namun begitu, tidak terhalang daripada membenarkan permohonan tersebut sungguhpun tatkala suatu persoalan undang-undang menjadi isu jika,

sepertimana yang diterangkan oleh kes ini, Mahkamah tersebut adalah berpuashati bahawa isu undang-undang itu adalah tidak boleh dipertahankan atau tidak boleh dihujahkan. Begitu juga, di mana keterangan afidavit mendedahkan suatu pertikaian terhadap fakta-fakta, Mahkamah tersebut adalah berhak untuk menolak fakta-fakta itu jika ianya didapati tak konsisten dengan dokumen-dokumen semasa yang tidak boleh dipertikaikan.

[2] Fakta-fakta tersebut menunjukkan bahawa dari permulaan lagi pihak-pihak yang berkenaan mempunyai hak yang sama, dan tidak terdapat keterangan bahawa satu pihak menguasai kebebasan bertindak pihak yang lain itu. Tidak terdapat keterangan bahawa perayu-perayu tersebut telah dinafikan nasihat guaman bebas ketika memasuki pelbagai perjanjian tersebut. Pada hakikatnya, keterangan tersebut jelas menunjukkan bahawa mereka telah menyempurnakan dokumen-dokumen tersebut secara bebas dan tanpa apa-apa bantahan, dan telah pun menerima balasan bagi setiap satu dari perjanjian-perjanjian tersebut yang telah mereka sempurnakan. Ini adalah jelas tidak merupakan kes di mana perayu-perayu telah digesa untuk menyempurnakan dokumen-dokumen tersebut dalam tempoh masa yang terhad.

[3] Sekatan yang dikenakan oleh fasal 20 tidak disatukan sebagai suatu syarat bernombor dalam hakmilik itu sendiri tetapi bahawa keseluruhan Peraturan 1894 tersebut yang mana mengandungi fasal 20 yang dicabar itu adalah dilampirkan kepada hakmilik tersebut. Ini adalah sesuatu yang sungguh luarbiasa dan jika ianya bertujuan supaya ianya mempunyai kuasa berkanun maka dengan itu ianya tidak lagi mempunyai kesan yang sedemikian bilamana Peraturan 1894 tersebut dimansuhkan dalam tahun 1904. Dalam apa keadaan pun, tidak terdapat apa-apa pada muka depan hakmilik tersebut bagi menunjukkan bahawa ianya suatu hakmilik penduduk asal sepertimana yang ditakrifkan dalam Ordinan Tanah Sabah. Ianya adalah semata-mata suatu pajakan bagi tanah Karambunai tersebut oleh pemberi pajakan kepada penerima pajakan bagi tempoh 999 tahun, tertakluk kepada syarat-syarat yang dinyatakan dan fasal 20.

[4] Fasal 20 adalah hanya merupakan satu syarat yang lain hakmilik tersebut. Pemotongan fasal ini bermula dengan perayu-perayu membuat rayuan kepada Ketua Menteri untuk mendapatkan kelulusan bagi mengarahkan responden keempat untuk meminda hakmilik tersebut dengan memotong fasal tersebut. Perayu-perayu telah juga berusaha untuk mendapatkan bantuan Pemegang Amanah Raya, yang telah mentadbirkan hartapesaka nenek tersebut, untuk bersetuju dengan pemotongan fasal tersebut, yang mana dipersetujuinya. Fasal 20, dengan itu, telah dipotong dengan persetujuan perayu-perayu tersebut, yang kini merupakan pengganti bagi hakmilik tersebut, dan persetujuan yang sedemikian adalah mencukupi bagi memberikan kuasa kepada responden keempat untuk membuat potongan tersebut.

[Rayuan ditolak].

Cases referred to:
Tractor (M) Bhd. v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Mckay & Anor. v. Essex Area Health Authority & Anor. [1982] 2 AER 771 ***(refd)***
Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 SCR 445 ***(refd)***
Allcard v. Skinner [1887] 36 Ch. D 145 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 16
Land Ordinance 1930, s. 17(i) (revised)
Land Regulations of British North Borneo, 1894, cls. 20, 21, (repealed)
Ordinance 7 of 1913, ss. 28, 29 (repealed)
Proclamation No. XXIII of 1903, ss. 26, 27 (repealed)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), O. 18 r. 12(1)(a)
Sabah Land Ordinance (Cap. 68), ss. 4, 88

For the plaintiff - Tun Salleh Abbas; (Dr. Yaacob Merican and Jonathan Yasin with him); M/s. Ansari & Co.
For the 1st, 2nd, 3rd respondents - Marina Tin; M/s. Yap Chin & Tiu
For the 4th respondent - Juprin Wong Adamal, Senior Federal Counsel; State Attorney-General's Department, Sabah

JUDGMENT

Siti Norma Yaakob JCA:

We had dismissed this appeal with costs and we now give our reasons for having decided so.

The appellants (the plaintiffs in the Court below) are twin brothers and are the sons of Pengiran Mohd. Yusoff bin Pengiran Abdul Razak, deceased, and Pengiran Siti Alimah bte Datu Hussein, deceased. The appellants were born on 7 February 1966, and it was on that day too that they lost their mother and inherited her 1/2 undivided share in a leasehold comprised in Country Lease No. 04509117 situated in the District of Kota Kinabalu, Sabah. Together with the other 1/2 undivided share which forms part of the Estate of Pengiran Siti Hapsah bte Pengiran Mohd. Salleh, the appellants' grandmother who died on 1 August 1978, the two parcels of land, covering an area of 3835 acres more or less, form the subject matter of the dispute in these proceedings. We shall refer to these lands as the Karambunai land. Attached to the title is a copy of the Land Regulations Of British North Borneo, 1894. (the 1894 Regulations) of which clause 20 forbids any dealing on the land with non-natives.

With that restriction in the title, the Karambunai land had remained with the family of the appellants until 1984 when a number of transactions affecting the land dating from 1984 - 1992, were entered into by the appellants with the 1st - 3rd respondents with the result that the appellants are now beneficially entitled to only 500 acres, whilst the main bulk of 2735 acres have either been sold or subleased to the 1st and 2nd respondents with the balance compulsorily acquired by the Federal Government. It is to question the validity of the transactions relating to the sale and subleases that proceedings were first commenced in the High Court at Kota Kinabalu. The 4th respondent is made a party as the appellants question his powers to amend the title and additionally as the authority who registered the sale and subleases of the bulk of the Karambunai land to the 1st and 2nd respondents, the appellants consider him to be a necessary party to give effect to the different prayers that they seek in their amended statement of claim.

It is not disputed that prior to his death on 28 August 1989, Pengiran Mohd. Yussof bin Pengiran Abdul Razak (the appellants' father) had every intention to reap the utmost benefit from the Karambunai land by developing it into a housing and commercial project. However, there were 2 obstacles that stood in the way of his objective. The first is that although the appellants are the direct beneficiaries to the Karambunai land by way of inheriting it through their mother's and grandmother's estates, the land could not be vested to them wholly as

the estate duty due on their mother's estate had not been settled. Both estates were initially managed by the Public Trustee and as at 14 October 1982, the duty leviable on the estate of the appellants' mother was RM365,160.91.

The second obstacle was that the appellants' father needed a financier for his ambitious project. For that purpose and through the good offices of a relative, the then Minister of Federal Territories, Datuk Pengiran Othman Rauf @ Awang (Pengiran Othman), the appellants' father befriended the 3rd respondent, the managing director of the 1st and 2nd respondents. Thus any reference to the 3rd respondent in this judgment includes the 1st and 2nd respondents as well and *vice versa*. That was in 1982 and it was through this contact and the friendship that followed that two important events took place in the same year.

The first is the execution of a memorandum of intent dated 27 August 1982, by the appellants' father, Pengiran Othman and the appellants on one hand and the 1st respondent on the other. In this transaction the appellants' father and Pengiran Othman acted as the legal representatives of the appellants as the latter were only 16 years old then.

Under the memorandum, the appellants together with their legal representatives, agreed to grant the 1st respondent a 99 year lease over 1500 acres of the Karambunai land (the leased land) for the purpose of developing the area into four specific projects namely housing, commercial, industrial and tourism, to be undertaken by the 1st respondent on a joint venture basis with the appellants. In return, the appellants were to be paid varying amounts of fixed rates of rental per acre per annum for the different types of project undertaken. Additionally, the 1st respondent also agreed to effect settlement of the estate duty due on their mother's estate as well as provide financial loans and advancement of rental to the appellants for their education whenever necessary.

The settlement of estate duty was done through a letter dated 14 October 1982, written by Messrs. Skinner, Lind Robertson, Pang & Willie, the appellants' then solicitors, to the Public Trustee, enclosing the amount of RM365,160.71 being the amount of estate duty due, on the mother's estate. This enabled the asset of the mother's estate, this being the 1/2 undivided share in the Karambunai land to be vested in the appellants. It is also not disputed that apart from remitting the estate duty, the 3rd respondent also paid out various sums totalling RM111,460 to the appellants from March 1983 to March 1984 in compliance with the memorandum.

The appellants attained 18 years of age on 7 February 1984, and a month after that, they confirmed the memorandum of intent by executing the first of many agreements with the 1st respondent containing almost similar terms to what had been previously agreed upon under the memorandum. This agreement dated 8 March 1984, is referred to as the first agreement.

The appellants were all too aware that sub-leasing part of the Karambunai land to the 1st respondent is prohibited by clause 20 of the 1894 Regulations which is attached to the title. To circumvent this and to fulfill their other obligations under the first agreement, particularly clause 2, which obliged the appellants to seek a partitioning and the issue of separate documents of title in respect of the leased land and the balance portion of the land, the appellants applied through Dato Harris Salleh, the then Chief Minister of Sabah on 10 September 1984, to delete clause 20 of Part III of the Annexure to the Deed of Lease. With the consent of the Public Trustee, who was administering the estate of the appellants' grandmother, the 4th respondent amended the title by deleting the provisions of clause 20 and registered such amendment and deletion on 3 December 1984. It is interesting to note

that even before this deletion took place, a memorandum of sublease dated 18 September 1984 was registered at the Central Land Registry, Kota Kinabalu on 24 November 1984. There is also evidence that in 1985, the 1st respondent created three charges on the sublease to secure loans totalling RM31million granted by Kewangan Usaha Bersatu Berhad to Everwrite Management Sdn. Bhd., a company controlled by the 3rd respondent.

The first agreement was short-lived as it was replaced on 18 October 1984, by a second agreement executed by the appellants with the 1st and 2nd respondents. This replacement became necessary when the State Government of Sabah threatened to acquire the leased land through the Sabah Economic DevelopmentCorporation if the appellants and the 1st respondent did not execute a fresh joint venture agreement based on terms and conditions as put forward by the Government. Under this second agreement the intention to have the 1,500 acres of the Karambunai land subleased to the 1st respondent for a period of 99 years is maintained but the rentals to be paid to the appellants have been fixed at RM22.5 million for the duration of the leased period. This was to be settled by the 1st respondent issuing and allotting to the appellants 9 million of its shares at RM1 each credited as fully paid and this would be offset against the rentals payable under the agreement. This allotment, however, never took place, but instead a purported transfer of the shares was made to the appellants who, in turn, executed a trust deed with the 2nd respondent dated 22nd July, 1985, wherein the appellants acknowledge that they hold the shares as trustees for the beneficiary, the 2nd respondent.

The balance of the rental amounting to RM13.5 million was to be settled by the 2nd respondent through the creation of another trust and by instalments on terms and conditions as specifically set out in clause 4.2 of that agreement.

Besides the second agreement, the appellants also executed a power of attorney, also dated 18 October 1984, in favour of the 1st respondent to enable the 1st respondent to exercise all the rights and powers conferred upon it by the second agreement. This power of attorney was registered with the Magistrates Court, Kota Kinabalu on 23 October 1984.

The second agreement also had a short life span, as on 30 December 1985, the appellants together with the 1st and 2nd respondents, rescinded the second agreement by a deed of revocation (the third agreement) and they also agreed to revert to the first agreement as being operating and binding upon them. Likewise, the power of attorney dated 18 October 1984, was also revoked and this is evidenced by another deed of revocation also dated 30 December, 1985. The reason given for these revocations is that the threat of acquisition of the leased land no longer existed in December 1985, as the State Government led by Datuk Harris Salleh was not returned to power following a State election.

The first agreement also suffered the same fate as the second agreement, as by a fourth agreement dated 20 February, 1986, the parties mutually agreed to rescind the first agreement and substitute it with another sublease over the same portion of land to the 1st respondent. This time the revocation became necessary as the parties were advised that as the Public Trustee, the registered owner of the other half of the undivided Karambunai land by virtue of being the Administrator of the estate of the grandmother, was not a party to the first agreement and the memorandum of sublease, the two agreements may not be enforceable. Moreover, as the registered owners of only half of the undivided Karambunai land, the appellants could not by themselves register a sublease for a specific portion of the Karambunai land. The land had therefore to be demarcated.

As a first step, the Public Trustee obtained an order of Court dated 17 February 1986, allowing the Karambunai land to be demarcated and partitioned into two equal portions of 1,917.5 acres each. Following this, the fourth agreement dated 20 February 1986, was entered into and in essence the intentions of the first agreement were maintained. Only this time the 1,500 acres agreed to be sub-leased to the 1st respondent, is confined to the 1,917.5 acres delineated to the appellants. No new memorandum of sublease was executed by the parties under the fourth agreement as they seem to be content to rely on the memorandum registered earlier on 24 November 1984.

The appellant's father died on 28 August 1989. Between 1987-1991, in compliance with the fourth agreement, substantial sums of money were advanced by the 3rd respondent to the appellants for their education and maintenance and set off as rentals due under the sublease.

The next transaction over the Karambunai land took place in 1991, when the appellants:

(1) sold 600 acres of their portion

(2) leased another 2 plots covering a total area of 356 acres of their portion for a period of 99 years

(3) leased 1415 acres of the portion that was delienated to the Public Trustee also for a period of 99 years to the 1st respondent free from all encumbrances and with vacant possession for a total consideration of RM4.8 million. The terms and conditions providing for the sale and leases are contained in the fifth agreement dated 19 September 1991. This agreement also provides for the portion delienated to the Public Trustee to be transferred to the appellants and that transfer was subsequently registered on 5 April 1994.

Then on 11 July 1992, the appellants executed a supplemental agreement, this being the last of the many agreements that they had executed with the 1st respondent, varying the terms of payment of the consideration sum under the fifth agreement, by speeding its payment.

The consideration sum of RM4.8 million due to the appellants under the fifth and supplemental agreements has been paid fully to the appellants and the appellants, have in turn executed a memorandum of transfer dated 3 November 1993 transferring the 600 acres of the Karambunai land to the 1st respondent and this memorandum has been registered on 5 April 1994. Likewise a memorandum of sub-lease dated 2 April 1994 to cover all the leased areas pursuant to the fourth agreement dated 20 February 1986 and the fifth agreement dated 19 September 1991 totalling 2,725 acres has also been registered in favour of the 1st respondent on 5 April 1994. Thus as at that date:

(1) the only subsisting agreements between the appellants and the 1st respondent are the fourth, fifth and supplemental agreements, the other agreements having been mutually rescinded

(2) out of the total area of 3,835 acres that make up the Karambunai land, the appellants are now only beneficially entitled to 500 acres, as the remaining areas have either been sold or subleased by them to the 1st respondent;

(3) the appellants have been paid a total sum of RM10,856,714.79 by the 1st respondent to account for all sums due under the memorandum of intent, the first, fourth, fifth and supplemental agreements; and

(4) that the 1st respondent has already commenced development of the Karambunai land over which they have title, into a world class holiday resort.

It is the appellants' case that they only became aware of the implications of the many agreements they had executed in October 1993 when they were served with the necessary papers of proceedings relating to Originating Summons No. K24-124-93 brought by the 1st respondent against them and another as respondents for a declaration that based on the agreements executed and the advances and loans made to the appellants, the Karambunai lands had become the property of the 1st respondent. This matter is still pending.

It was following this awareness that the appellants filed the present suit leading to this appeal on 8 June 1994 and in their amended statement of claim, they allege:

(1) that they had been unduly influenced by the 3rd respondent to enter into the many agreements with the 1st respondent which resulted in their losing the greater portion of their inheritance; and

(2) the deletion of clause 20 of the 1894 Regulations was *ultra vires* the powers of the 4th respondent.

As such, the appellants seek a rescission of all such agreements namely the memorandum of intent, the first, second, third, fourth, fifth agreements, the supplemental agreement, the trust deed and a declaration that they are all void and invalid. As against the 4th respondent the appellants seek an order to expunge from the Register:

(1) the two memoranda of sublease registered on 24 November 1984 and 5 April 1994;

(2) the memorandum of transfer registered on 5 April 1994; and

(3) the reinstatement of clause 20 in Part III to the Annexure to the Deed of the Lease of the Karambunai land.

In other words the appellants want to be reinstated into their original *status quo* so that they are to remain the beneficial owners of the whole of the Karambunai land.

Following the filing of their respective statements of defence the 1st - 3rd respondents jointly and the 4th respondent separately applied to have the appellants' suit struck out under O. 18 r. 19 (1)(a), (b) and (d) of the Rules of the High Court, 1980 and under the inherent jurisdiction of the Court on the grounds that the amended statement of claim discloses no reasonable cause of action, it is frivolous and vexatious and it is an abuse of the process of Court. Sulaiman J agreed with the respondents and struck out the appellants' suit with costs and hence the present appeal before us.

The discretionary power to dismiss an action summarily under O. 18, r. 19 and under the inherent jurisdiction of the Court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. *Tractor (M) Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1. Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. *Mckay & Anor. v. Essex Area Health Authority & Anor.* [1982] 2 AER 771.

When a question of law becomes an issue, this in itself will not prevent the Court from granting the application for as long as the Court is satisfied that the issue of law is unarguable and unsustainable it may proceed to determine that question. See *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 SCR 445. Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the Court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

It is the appellants' contention that whilst the learned trial Judge appreciated the law and procedure governing applications for striking out pleadings under O. 18, r. 19 and under the inherent jurisdiction of the Court, nonetheless he erred when he applied the law to the facts of the case. This is so when he failed to make a critical analysis of the affidavit evidence that was before him, as he did not examine such evidence with a fine tooth comb. Additionally, his finding on the issue of *ultra vires* is wrong altogether as he had relied solely on the opinion expressed by the Attorney General which the appellants contend does not bind the learned Judge in any way. As the issue is a question of law which requires mature arguments, it must be argued at the trial and not dealt with summarily.

A perusal of the amended statement of claim shows that the appellants' cause of action against the 1st - 3rd respondents is founded on the allegation that the 3rd respondent had unduly influenced them into executing the many agreements which they now claim were made without consideration or for purposes that were unlawful. It is for this very reason that they now seek to have such agreements set aside.

The first objection taken by the 3rd respondent is that O. 18 r. 12(1)(a) of the Rules of the High Court, 1980, has not been complied with as there are no particulars of undue influence pleaded in the amended statement of claim.

The answer to this lies in perusing the amended statement of claim in its entirety whilst it is true that such particulars have not been itemised by numbering them in order, nonetheless they have been pleaded sufficiently enough at paragraphs 6 - 10, where there are averments to how the appellants had befriended the 3rd respondent which led to the 3rd respondent advising, assuring and advancing money to them. The same averment is reflected again in paragraphs 26 and 27 where the appellants refer to the trust and confidence which they had with the 3rd respondent as a result of their friendship with him and the financial advances made by the 3rd respondent. These allegations have all been denied by the 3rd respondent in his re-amended statement of defence and likewise at paragraphs 5 - 7 of his affidavit supporting his application to strike out and he cannot now at this stage complain that no particulars had been pleaded or that he had no knowledge of them. If indeed such particulars were insufficient, he should have asked for further and better particulars which he had not done.

The principle behind the equitable doctrine of undue influence is expressed most aptly by Lindley LJ in the case of *Allcard v Skinner* [1887] 36 ChD 145 to be as follows:

> Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons

could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

In the Malaysian context, undue influence has been given statutory recognition and it is defined by s. 16 of the Contracts Act 1950, and we reproduce the provisions of that section insofar as they are relevant to the facts of this appeal.

16. "Undue Influence".

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or

(b) ...

(3) (a) Where a person is in a position to dominate the will of another, enters into a contract with him, and the transaction appears on the face of it, or on the evidence adduced, to be unconscionable the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) ...

Turning now to the appellants' allegation that they have been unduly influenced by the 3rd respondent to part with the main bulk of the Karambunai land, they rely on the evidence that:

(1) they had no independent legal advice when they executed the various agreements

(2) they were placed in an unequal bargaining power.

To determine this allegation, it is necessary that we go through the circumstances surrounding the execution of each agreement and we start with the memorandum of intent dated 27 August 1982. At that point in time the appellants who were only 16 years old, had the benefit of the advice of their legal representatives in the persons of their father and Pengiran Othman. It is the appellants' contention that the legal representatives cannot give them the independent legal advice as one of them, the appellants' father was already indebted to the 3rd defendant as the latter had promised to settle the estate duty due on their mother's estate. They contend further that the Public Trustee who was then managing the mother's estate should have been consulted for such legal advice but he never joined in the arrangements.

That we agree would have been the ideal situation but it must be remembered that any move to consult the Public Trustee should come from the appellants' father, considering the tender ages of the appellants then. Their father never did so and for that matter neither did Pengiran

Othman. As a Minister, he must be acknowledged as a man of some good sense and we very much doubt that Pengiran Othman would readily lend his hand in dealings that could work against the appellants' interests but on the contrary his presence and endorsement lend support to our belief that the appellants had all the necessary independent advice that they needed to enter into the memorandum of intent.

If that is not enough, the memorandum was executed by the appellants before an advocate and solicitor, Encik Yussof Ahmad, whose signature appears at page 11 of the memorandum. Although his signature is not identified, a comparison of it with his signatures appearing at page 25 of the first agreement leaves us in no doubt that the appellants executed the memorandum before an advocate and solicitor and in all probability the appellants must have been legally represented and advised as well.

Two years later we see the execution of the first agreement dated 8 March 1984. Like the memorandum of intent, this first agreement was again executed by the appellants in the presence of Encik Yussof Ahmad. That first agreement runs into 25 pages and it is most unlikely that Encik Yussof Ahmad did not explain the contents and implications of such a lengthy document.

There is also documentary evidence that besides Encik Yussof Ahmad, the appellants had also sought the opinion of another advocate and solicitor, Encik Ansari Abdullah over the first agreement. That evidence is found in Encik Ansari Abdullah's bill of charges dated 29 May 1986 addressed to the appellants demanding payment for work done which included "giving opinion on the agreement dated 8 March 1984 executed between yourselves and M/s. Lipkland (S) Sdn. Bhd."

Seven months after the first agreement was executed, it was replaced by the second agreement dated 18 October 1984 which was executed together with a power of attorney. The reasons for this replacement as we have set out above, are not disputed. In this respect, Encik Ansari Abdullah, before whom the appellants executed the second agreement had in his affidavit affirmed on 6 October 1994 at paragraph 12 confirmed:

(1) that sometime in early October 1984, he was handed a draft copy of the second agreement together with a power of attorney.

(2) that he explained the terms and conditions of the second agreement and power of attorney to the appellants and also advised them to exclude 417 acres of beach fronting land from the agreement to enable them to develop the same at a later stage with other parties.

(3) that the appellants had agreed to this exclusion and he was brought to Kuala Lumpur to witness the execution of the second agreement and the power of attorney at the office of the 3rd respondent.

Besides the second agreement and the power of attorney, Encik Ansari Abdullah also admitted witnessing the execution of the third agreement, together with the revocation of the power of attorney, the fourth agreement and the trust deed but denied preparing any of such documents, a denial that is challenged by the 3rd respondent.

Another advocate and solicitor, Mr. Billy Lee Chong Hoe, prepared, explained and witnessed the execution of the fifth agreement. It is also not disputed that 10 months later the same solicitor was instructed by one of his partners, Mr. Lee Choon Wan, to prepare the

supplemental agreement and although he explained the contents of the supplemental agreement to the appellants, its execution was however witnessed by Mr. Lee Choon Wan instead.

On the face of the contemporaneous documents, there is also the contradicted affidavit evidence of Encik Ansari Abdullah explaining the role he played with regard to the preparation and the execution of the various agreements. Sulaiman J found such affidavit evidence to be unacceptable.

To begin with Encik Ansari Abdullah had come into the picture in early 1984 when he was instructed by the State Government to give his opinion on the arrangements contained in the first agreement. He did so by his letter dated 27 April 1984. At the same time, he was also acting for the appellants as from his own acknowledgement in his bill of charges dated 29 May 1986, he had also given his opinion on the first agreement to the appellants. It is his evidence that he ceased acting for the appellants altogether when he discharged himself by letter dated 7 March 1986, a contention that is disputed by the 3rd respondent who maintains that Encik Ansari Abdullah, despite his express notification to withdraw, never ceased acting for the appellants but continued doing so after 7 March 1986.

Dealing firstly with the execution of the second agreement and the corresponding power of attorney, Encik Ansari Abdullah has denied preparing such documents or any knowledge of the purpose of their execution.

This denial runs contrary to his own bill of charges dated 29 May 1986 and his involvement as a solicitor in this case. His bill of charges has itemised the work he had done for the appellants including "preparing, attesting and stamping of four (4) copies of the abovementioned agreement executed between yourselves and M/s. Lipkland (S) Sdn. Bhd. and a power of attorney for the same executed by yourselves".

This agreement must refer to the second agreement and the power of attorney that were later revoked by the third agreement and another deed of revocation dated 30 December 1985.

For that matter too, his denial that he was not aware of the true reasons why the second agreement was executed in the first place cannot be believed as he was appraised of all the facts of this case from the very beginning. It must be remembered that he was consulted by the State Government and the appellants for his opinion on the first agreement. Before the preparation and execution of the second agreement and the power of attorney, he was again instructed by the State Government to prepare a joint venture agreement on terms and conditions dictated by the State Government and on his own admission he did prepare such a joint venture agreement which was not acceptable to the appellants' father and the 3rd respondent. It was replaced by the second agreement, which strictly is not a joint venture agreement as such and the power of attorney. From these events, it is most unlikely that Encik Ansari Abdullah was not appraised of the true reasons for the execution of the second agreement and the power of attorney. By the same token he must have also prepared the third agreement and the deed revoking the power of attorney as at that point of time he seems to be the only solicitor who was advising the State Government, the appellants and the 3rd respondent at the same time. This is clear from the contemporaneous documents that are exhibited to the application to strike out.

The contemporaneous documents also show that Encik Ansari Abdullah was still involved with the appellants after March 1986. Four receipts dated 8 January 1987, 12 January 1987, 15 January 1987 and 29 April 1988, all signed by the appellants acknowledge that the

appellants had received from the first respondent various sums of money which was utilised partly to pay for the air tickets and other expenses of Encik Ansari Abdullah to enable him to come to Kuala Lumpur with the appellants. The fact that such expenses came from the rentals payable under the fifth agreement raises a strong inference that the appellants must have continued seeking the advice of Encik Ansari Abdullah in 1987 and 1988.

Perhaps the most telling evidence lies in Encik Ansari Abdullah's letter dated 11 October 1991 written to Mr. Billy Lee Chong Hoe, requesting a copy of the fifth agreement. He begins his letter with these opening words:

> We act for Pengiran Ahmad Shah and Pengiran Othman Shah ...

Then again on 23 September 1993, following an oral request by Encik Ansari Abdullah for a copy of the supplemental agreement, Mr. Billy Lee Chong Hoe wrote to the appellants directly confirming Encik Ansari Abdullah's request and in that letter Encik Ansari Abdullah is described as the lawyer for the appellants. It would appear from the contemporaneous documents that I have alluded to, that Encik Ansari Abdullah never ceased acting for the appellants despite formally discharging himself in March 1986 and submitting his bill of charges in May 1986.

Finally we come to the discrepancy found in the affidavit evidence of both Mr. Billy Lee Chong Hoe and Encik Ansari Abdullah with regard to the receipt of the fifth agreement and two other documents. It is Mr. Billy Lee Chong Hoe's evidence that Encik Ansari Abdullah had collected these documents and acknowledged receipt of them whilst Encik Ansari Abdullah states that he never received such documents and could not recall going to Mr. Billy Lee Chong Hoe's office to collect them.

Encik Ansari Abdullah's affidavit is affirmed 3 years after the event but on the face of the contemporaneous documents, this being Mr. Billy Lee Chong Hoe's letter dated 11 October 1991 where the acknowledgement is clearly seen, we consider that the trial Judge did come to the right conclusion when he placed no weight on Encik Ansari Abdullah's affidavit.

In the light of the documentary evidence, we cannot see how the appellants can contend that they were denied of any independent legal advice when they executed the various agreements. They executed such documents freely and without protest and this is not a case where the appellants were rushed into executing the documents within a limited span of time but that such execution were done over a period of ten years. They cannot now complain that just because they have been deprived of the main bulk of their inheritance, they had been unduly influenced into entering into contractual obligations which they now say are unconscionable. This is so as they had received consideration for each agreement that they had executed.

As the name implies, the memorandum of intent is nothing more than an expression of the intentions of the parties to enter into a contractual relationship and in this case that contractual relationship takes the form of a joint business venture where the appellants, on one hand, provided the lands for development and the 1st - 3rd respondents on the other hand, the finance and technical know how. From the very beginning then the parties were on equal footing and there is therefore no question of one party dominating the will of the other. Either party can pull out from the proposed joint venture and none will be the poorer. This as we know did not happen. Instead the appellants went ahead and executed the many agreements that span from 1982 to 1992. The fact that in 1982 the Karambunai lands were burdened with an estate duty debt, which was eventually settled by the 3rd respondent,

does not characterise him as the superior person with a dominating will, as the appellants were fully aware that without the settlement of estate duty, they were deprived of their inheritance and the enjoyment and benefits of the land. The payment of estate duty was part and parcel of their proposed business venture and was the first consideration that benefited the appellants as the Karambunai land that forms the estate of the mother was vested to the appellants.

The appellants have admitted that with each agreement executed they were compensated either in cash or in kind. As such there has been good consideration given and the appellants have been paid a total of more than RM10.8 million.

We now come to the appellants' cause of action against the fourth respondent that he had acted *ultra vires* his powers when he deleted clause 20 of Part III of the Annexure to the deed of lease.

The Karambunai land has a very interesting history in that it was gifted by the original owner, the Sultan of Brunei, to the appellants' ancestor, Pengiran Abdul Rauf and when the latter died, the Karambunai land devolved to his son, Pengiran Jalaluddin. Following a revolt and the execution of a treaty on 23 March 1988, with the North Borneo Company, the Government of the day, the Karambunai land was ceded to the company conditional upon a title being issued to Pengiran Jalaluddin. That title was issued on 15 November 1905, known as WCC 228, but this was later replaced by the present title deed issued on 16 July 1941. Under the present title deed, the Karambunai land was leased to Pengiran Jalaluddin's daughter, Siti Fatimah, for a term of 999 years effective from 23 March 1898, and subject to the prohibition under clause 6 that it shall not be transferred to an alien or non-native except with the consent of the company. The title deed also specifies that the lease is subject to the 1894 Regulations and a copy of the Regulations is attached to the deed.

The 1894 Regulations is divided into 3 parts. Part I makes special provisions to country land, Part II to town and suburban lands and Part III which incorporates clause 20, contains general provisions as to all lands. The 4th respondent deleted clause 20 and registered such deletion on 3 December 1984, and in substance that clause reads as follows

> 20. All dealings in land between European and Chinese and other foreigners on the one hand and the natives of the country on the other hand are hereby expressly forbidden and no such dealing shall be valid or shall be recognised in any Court of Law unless such dealings shall have been entered into and concluded before 16 January 1883.

The deletion of clause 20 started with the appellants appealing to the then Chief Minister of Sabah, Dato Harris Salleh, through their letter dated 10 September 1984, seeking his approval to direct the 4th respondent to amend the title of the Karambunai land by deleting clause 20. At the same time the appellants also sought the assistance of the Public Trustee, who was administering their grandmother's estate to agree to the deletion. That request is contained in the appellants' letter dated 16 November 1984. The Public Trustee gave his consent and on 26 November 1984, the 4th respondent offered to amend the title of the Karambunai land, an offer that was readily accepted by the appellants and on 3 December 1984, the 4th respondent registered such deletion.

Before us one of the objections taken by the appellants is that the copy of the memorandum of amendment dated 30 November 1984, which enabled the 4th respondent to amend the title and produced by the appellants at page 657 of the appeal records differs to the one produced by the 4th respondent at page 453. Whilst both documents relate to the same subject matter,

the one produced by the 4th respondent is only a draft which was attached to his letter dated 26 November 1984, the offer to amend. The one produced by the appellants is the completed and final document which was acted upon by the fourth respondent and as such we attach no weight to the objection on the differences between the two documents.

Likewise we see no merit to the appellants' contention that on the face of the memorandum of amendment, the 4th respondent had acted under s. 88 of the Sabah Land Ordinance, Cap. 68 to effect the deletion. Clearly any reference to s. 88 is wrong as the provisions of that section have no relevance to the 4th respondent's power to amend. Section 88 relates to indefeasibility of title by way of registration.

When the Karambunai land was first alienated to the appellants' ancestor, the relevant legislation in force was the 1894 Regulations, which contained the impugned clause 20. However clause 21 does make provision for the acquisition of such land by non-natives through the Government who would purchase such land and lease the same to non-natives at a premium.

The 1894 Regulations was only a subsidiary legislation enacted under Proclamation No. 111 of 1894. On 1 April 1904 Proclamation No. XXIII of 1903 repealed and replaced Proclamation No. 111 of 1894 and with it, the 1894 Regulations as well. Thus when the Karambunai land was alienated to Pengiran Jalaluddin on 15 November 1905, the relevant legislation in force was the 1903 Proclamation which preserved clauses 20 and 21 of the 1894 Regulations at ss. 26 and 27.

The 1903 Proclamation was in turn repealed by Ordinance 7 of 1913 which also preserved the provisions of clauses 20 and 21 of the 1894 Regulations at ss. 28 and 29.

Ordinance 7 of 1913 was later repealed by the Land Ordinance 1930 where provisions similar to clause 20 of the 1894 Regulations have been preserved by s. 17(i). The Land Ordinance 1930 was subsequently revised and reprinted by Sabah Land Ordinance (Chapter 68) which is the current legislation regulating the alienation and occupation of state lands in Sabah. It also classifies such lands as town lands, country lands and lands with native titles and it also retains similar provisions of the impugned clause 20 at s. 17.

It is the appellants' contention that since the Karambunai land was originally alienated by treaty, it does not fall within any of the class of titles under Chapter 68, but that it is still subject to the 1894 Regulations. As it constitutes a class of its own, the only way it can be acquired by a non-native is for the Government to acquire the land on behalf of the non-native and to have the same leased to the non-native on payment of a premium. To that end what was done by the 4th respondent in amending the title by deleting clause 20 was illegal as he had no powers to do so.

The historical background of the title to the Karambunai land serves as a complete information as to how the land came to be owned by the appellants' family. It also serves as a better understanding of the feelings of loss and frustration experienced by the appellants when they realised that they had parted with the main bulk of their inheritance.

Besides that, the historical background can do no more as the title must be appraised in its present form and in the light of the relevant laws applicable to it. A perusal of the title at pages 426-433 of the appeal records shows that the restriction placed by clause 20 is not incorporated as a numbered condition in the title itself but that the whole of the 1894 Regulations which contained the impugned clause 20 is attached to the title. This is most

unusual and if it is intended that it shall have statutory force then it ceased to have such effect when the 1894 Regulations was repealed in 1904.

The fact that there is a reference to clause 20 by attaching the whole of the 1894 Regulations to the title must be intended to mean something. Since another legislation has replaced and repealed the 1894 Regulations, the only inference that we draw is that the reference to clause 20 in the title can only mean that it was intended to be another condition to the title, although the manner of incorporation that additional condition has been done in the most unusual way.

On the face of the title, there is nothing to suggest that it is a native title, which under s. 4 of Chapter 68 has been defined to mean "an entry in the Native Title Register or in the Field Register under Part IV". A perusal of the title shows it to be nothing more than a lease for which the lessor, The British North Borneo Company had leased the Karambunai land to the lessee, Pengiran Siti Fatimah binte Pengiran Jalaluddin, the appellants' ancestor for a term of 999 years with effect from 23 March 1838 subject to the six terms and conditions expressed therein and the provisions of clause 20 which is attached to the title. It is interesting to note that condition 6 also restricts any transfer to an alien except with the consent of the company but it is quite unlike the provisions of clause 20 which speaks of absolute restraint altogether.

Being just another additional condition, can it be deleted by the consenting parties to the lease, who are now the successors in title? Secondly can such consent empower the 4th respondent to effect such deletion? We answer both questions in the affirmative.

All the contemporaneous documents executed by the appellants leading to the amendment to the title indicate an expression of free will and absence of any coercion of any kind. The appellants were represented by Encik Ansari Abdullah who had witnessed their signatures in the Offer of Amendment and the Memorandum of Amendment both dated 26 November 1984. Since the parties have consented to delete a term of their contractual obligations, the 4th respondent was doing nothing more than to act on such a consent when he deleted clause 20. He derived his powers from such a consent and he cannot be faulted for this, particularly when the title of the land does not fall into any of the three classes of lands identified by Chapter 68.

There is an abundance of documentary evidence produced in this appeal and there is no allegation from anybody that any of the documents is false. From our assessment of these documents and the affidavit evidence available the appellants have failed to establish their allegation of undue influence. The 3rd respondent's lengthy affidavit in support of the application to strike out has not been sufficiently replied by the appellants in their affidavit in reply. Instead Encik Ansari Abdullah's affidavit was relied upon by them to fill in the gap but as we have indicated above there are too many material discrepancies in his affidavit when viewed against the many contemporaneous documents and to that end we endorse the learned trial Judge's conclusion that no weight be given to it.

As for the issue of law raised against the 4th respondent since that can be determined from the undisputed documentary evidence, a trial of the action will not add anything more to what has already been canvassed before the trial Judge and before us. If anything at all if this suit proceeds to trial it will be with the hope that something may turn up at the trial but in the light of the affidavit and documentary evidence, we found that the respondents have no case to answer.